sFiled 9/20/06 In re Jose C. CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re JOSE MANUEL C., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. JOSE MANUEL C., Defendant and Appellant.	A113000 (Napa County Super. Ct. No. JV14559)

Jose Manuel C. (appellant) appeals from jurisdictional and dispositional orders sustaining assault and battery allegations. He contends there is insufficient evidence to support the juvenile court's findings, that the court erred by failing to declare his offenses felonies or misdemeanors, and that the record incorrectly states his maximum period of confinement.

We conclude the matter must be remanded for the juvenile court to exercise its discretion to declare the offenses misdemeanors or felonies as required by Welfare and Institutions Code section 702.[1] While we agree the record contains an inaccurate statement of appellant's maximum period of confinement, the issue may be rendered moot depending upon how the court exercises its discretion upon remand. We affirm the juvenile court's

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

orders in all other respects.

PROCEDURAL HISTORY

The Napa County District Attorney filed a three-count section 602 juvenile delinquency petition on December 13, 2005, charging appellant with battery causing serious bodily injury, aggravated mayhem, and assault by means of force likely to produce great bodily injury. (Pen. Code, §§ 205 [count two], 243, subd. (d) [count one], & 245, subd. (a)(1) [count three].) As to the assault and battery counts, the petition contained special allegations that appellant had personally inflicted great bodily injury. (Pen. Code, § 12022.7, subd. (a).)

After a contested jurisdictional hearing on January 4, 2006, the juvenile court sustained the assault and battery counts. The court did not sustain the mayhem count or the special allegations that appellant had personally inflicted great bodily injury.

At the dispositional hearing on January 30, 2006, the juvenile court declared appellant a ward of the court, imposed a 150-day placement in juvenile hall with 30 days stayed and 53 days credited, ordered restitution, and imposed a maximum period of confinement of five years. Appellant timely appealed.

FACTS

At about 3:00 p.m. on December 9, 2005, Jose Alberto C. approached Ivan C. in the Napa High School parking lot and confronted him about making phone calls to his home. Jose Alberto is appellant's cousin.[2] Ivan testified that four more boys, including appellant, joined Jose Alberto and surrounded his car. After Ivan responded to Jose Alberto, he felt someone punch him in the side of the head. He could not see who punched him first, but it was not Jose Alberto. Several boys in the group, including Jose Alberto and Jesus L., began hitting Ivan. Ivan lost his vision shortly after the attack began. He never saw appellant hit him.

[2] To avoid confusing Jose Alberto C. with appellant Jose Manuel C., we refer to the former as "Jose Alberto" and to the latter as "appellant."

Catharine F. was near the school parking lot waiting for a friend when the fight broke out about 20 feet away. She saw four boys involved. Two of the boys, one of whom had big ears, began hitting and kicking one of the boys in the stomach and face. Another boy was standing off to the side, watching from about five feet away from the group. Catharine testified that the one standing to the side "was sort of involved like with his face," and that he was encouraging the others through body language and by "egging" them on with his arms. At first Catharine was hesitant to say anything but finally said, "stop." After the boys hit and kicked Ivan a few more times, they ran away. Catharine saw three boys run away. She was about 75 percent sure that appellant was part of the group, either as an active participant in the beating or as the boy who was off to the side. She stated that appellant was not the boy with big ears.

Cecilia Reyes, whose son was enrolled at Napa High School, was called to the dean's office that afternoon and saw what she first thought were four boys horsing around in the parking lot. She saw the altercation from a distance of about 37 feet as she stood in front of her car. According to Reyes, the fight started with one or more of the boys shoving the victim at arm's length. The shoving progressed to a fight that lasted about 30 seconds, after which the group of attackers ran off. Reyes did not see any one specific punch or kick, although she stated that two of the boys were the more active of the four. From her vantage point, the boys were partly obscured behind a vehicle and were crouching. According to Reyes, none of the four boys were just standing there; all of them were engaged in some kind of movement during the fight. They were all "on" the victim, hitting him at close quarters. She did not know if she could identify any of the boys but she remembered a big-eared boy running away from the scene.

Maricella P., Ivan's girlfriend, testified that she arrived at the school parking lot in time to see a group of boys, including Jose Alberto, appellant, and someone she identified as "Piojo," running away from Ivan, who appeared to be hurt. She did not see any of the fight itself. She pointed out appellant in court as one of the boys she saw running away from the scene.

School resource officer Ken Chapman, a police officer with the city of Napa, responded to the scene of the fight and found Ivan crying and distraught. Ivan was holding his face with both hands to his eyes, and he was bleeding from his mouth. Both of his eyes were swollen, although the left eye had suffered more damage. After Ivan was taken to the hospital, he was able to identify Jose Alberto and appellant as the ones who "did it" by pointing to their pictures in the school yearbook. Later, Ivan said another one of the assailants was nicknamed "Piojo," whom Chapman subsequently learned was Jesus L. Chapman was never able to learn the identity of the "big-eared" boy whom some of the witnesses had seen.

Ivan's mother testified that appellant's mother telephoned her after the incident and apologized for what had happened. Appellant's mother told Ivan's mother that her son was present at the fight but had not touched Ivan, and she wanted Ivan to say that her son did not touch him.

Doctor Richard Beller, an ophthalmologist, saw Ivan at the emergency room on December 9, 2005, and he continued to treat Ivan afterwards. He diagnosed a choroidal rupture in Ivan's left eye as a result of blunt trauma, leading to a loss of visual acuity. Dr. Beller testified that Ivan could have significant and relatively dramatic improvement in his vision but that there would always be structural and irreversible vision loss to some extent.

DISCUSSION

1. The Evidence is Sufficient to Sustain the Assault and Battery Allegations.

Appellant contends the evidence does not support the court's finding that appellant aided and abetted the battery and assault. He claims he was a mere bystander at the fight and did not encourage, participate in, or contribute to the attack on Ivan, other than to make facial expressions or use approving "body language" as he observed the fight.

The rules for reviewing the sufficiency of the evidence in criminal cases apply with equal force to juvenile delinquency cases. (*In re Samuel C.* (1977) 74 Cal.App.3d 351, 354.) The critical inquiry is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1371.) "When an appellant asserts there is insufficient evidence to

support the judgment, our review is circumscribed. [Citation.] We review the whole record most favorably to the judgment to determine whether there is substantial evidence–that is, evidence that is reasonable, credible, and of solid value–from which a reasonable trier of fact could have made the requisite finding under the governing standard of proof. [Citations.] The trier of fact, not the appellate court, must be convinced of the defendant's guilt, and if the circumstances and reasonable inferences justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant reversal of the judgment. [Citation.]" (*In re Jerry M.* (1997) 59 Cal.App.4th 289, 298.)

The juvenile court found that appellant aided and abetted the battery and assault on Ivan and therefore had liability as an accomplice. "A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime. [Citation.]" (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.) The test for aider or abettor culpability is "whether the accused in any way, directly or indirectly, aided the perpetrator by acts or encouraged him by words or gestures." (*People v. Villa* (1957) 156 Cal.App.2d 128, 134.) An aider and abettor's state of mind may be proven circumstantially from his volitional acts with knowledge of their probable consequences. (*People v. Beeman* (1984) 35 Cal.3d 547, 559-560.)

The "act" required for aiding and abetting liability need not be a substantial factor in the offense, and liability attaches to anyone concerned, however slight such concern may be. (*People v. Durham* (1969) 70 Cal.2d 171, 184-185, fn. 11; *People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 743.) "Neither mere presence at the scene of a crime, nor the failure to take steps to prevent a crime, is alone sufficient to establish that a person is an aider and abettor. Such evidence may, however, be considered together with other evidence in determining that a person is an aider and abettor. [Citation.]" (*In re Jose T.* (1991) 230 Cal.App.3d 1455, 1460.) For example, it is sufficient if the aider and abettor is present for the purpose of diverting suspicion, to serve as a lookout, or to take charge of

an automobile used to commit the offense. (*People v. Swanson-Birabent, supra,* 114 Cal.App.4th at pp. 743-744.) Relevant factors to consider include presence at the scene of the crime, companionship, and conduct before and after the offense. (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094.) Flight from the scene is one of the factors tending to show consciousness of guilt. (*Id.* at p. 1095.)

Here, appellant was not a mere passerby expressing approval of the attacker's actions. (Cf. *People v. Luna* (1956) 140 Cal.App.2d 662, 664 ["one who merely stands by, watching an assault and even approving of it is not aiding and abetting"].) Rather, he approached the victim along with the other attackers. Ivan testified that the boys who approached him, including appellant, surrounded his car, supporting an inference that appellant and his associates intended to limit Ivan's ability to retreat to safety. Appellant's reaction to the fight, including "egging on" the beating through body language, arm movements, and facial expressions, suffices to demonstrate his intent to encourage, promote, and support the attack. It is also relevant that the first person to hit Ivan was someone other than the person who first confronted him, Jose Alberto. The sequence of events suggests that the other boys, including appellant, shared Jose Alberto's intent to confront and assault Ivan; they did not simply join in or observe a fight between Ivan and Jose Alberto. And, the fact appellant ran off with the other boys after Catharine told them to stop is evidence of consciousness of guilt. Thus, the evidence supports an inference that appellant knew his associates' intent was to beat Ivan, that appellant intended to encourage them in the beating, and that injury to Ivan was reasonably foreseeable.

Moreover, according to Cecilia Reyes, *all* of the boys were physically participating in the fight. None were standing apart and all were "on" the victim, hitting him at close quarters. Although Reyes did not see any one specific punch or kick, her testimony nevertheless supports the conclusion that appellant was doing more than simply standing to the side and subtly expressing approval for the attackers' actions. Therefore, we reject appellant's challenge to the sufficiency of the evidence.

2. The Juvenile Court Erred by Failing to Declare Appellant's Offenses Felonies or Misdemeanors.

Appellant contends the juvenile court erred by failing to declare expressly whether the assault and battery offenses were felonies or misdemeanors. We agree.

Section 702 provides that when a "minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, the court shall declare the offense to be a misdemeanor or felony." (See also Cal. Rules of Court, rules 1488(e)(5), 1493(a)(1), 1494(a).) In part, the statute serves an administrative purpose, providing a record from which the maximum term of physical confinement may be determined in the event of future adjudications. (*In re Manzy W.* (1997) 14 Cal.4th 1199, 1205.) The statute also serves the key purpose of "ensuring that the juvenile court is aware of, and actually exercises, its discretion under Welfare and Institutions Code section 702." (*Id.* at p. 1207.)

By its plain terms, section 702 requires an express declaration of whether a so-called "wobbler" offense was a misdemeanor or felony. (*In re Manzy W., supra,* 14 Cal.4th at p. 1204.) "[N]either the pleading, the minute order, nor the setting of a felony-level period of physical confinement may substitute for a declaration by the juvenile court as to whether an offense is a misdemeanor or felony. [Citation.]" (*Id.* at p. 1208.) It is also not enough that a petition describes an offense as a felony and the juvenile court finds the allegations of the petition to be true. (*In re Kenneth H.* (1983) 33 Cal.3d 616, 619-620.) When a juvenile court fails to comply with section 702, the cause may be remanded with directions to determine the character of a sustained offense. (See *id.* at p. 620.)

The offenses appellant was found to have committed are wobblers punishable either as felonies or misdemeanors. (See Pen. Code, §§ 243, subd. (d), 245, subd. (a)(1).) In the section 602 petition, the offenses were charged as felonies. They are described as felonies in the probation officer's report, in the minute order associated with the dispositional hearing, and in a notice directed to the Napa Valley Unified School District. However, the juvenile court did not explicitly declare the offenses to be misdemeanors or felonies after

sustaining the assault and battery allegations of the petition.[3] The People concede as much and also acknowledge that nothing in the record establishes that the juvenile court was aware of its discretion under section 702 to declare the offenses misdemeanors or felonies.

Nevertheless, the People contend remand is unnecessary because certain comments by the juvenile court "strongly suggest the court implicitly determined the offenses were felonies." The People cite portions of the record in which the juvenile court described appellant's offenses as "serious," and they refer to the court's statements that it "consider[ed] this to be a camp case" and that "[t]his is not the type of crime that's just a court commitment." The People claim it is not reasonably probable the juvenile court would declare the offenses misdemeanors on remand.

Remand is not automatic when a juvenile court fails to comply with section 702. (*In re Manzy W., supra,* 14 Cal.4th at p. 1209.) "[S]peaking generally, the record in a given case may show that the juvenile court, despite its failure to comply with the statute, was aware of, and exercised its discretion to determine the felony or misdemeanor nature of a wobbler. In such case, when remand would be merely redundant, failure to comply with the statute would amount to harmless error." (*Ibid.*)

In *Manzy W.,* the Supreme Court determined that the failure to comply with section 702 was not harmless where nothing in the record established the juvenile court was aware of its discretion to sentence an offense as a misdemeanor rather than a felony. (*In re Manzy W., supra,* 14 Cal.4th at p. 1210.) Likewise, as the People acknowledge, nothing in the record here establishes that the juvenile court was aware of its discretion to declare the offenses misdemeanors or felonies. At no time did the court refer to its discretion to declare the offenses misdemeanors, nor did the probation officer, the prosecution, or appellant's trial counsel point out that the court possessed such discretion. (*Ibid.*)

---

[3] At the conclusion of the jurisdictional hearing, the juvenile court recited that the battery count was charged as a felony but did not expressly state it sustained the battery allegation as a felony offense. The People concede that the court's reference to the charged offense does not constitute compliance with section 702.

Furthermore, we are not persuaded that the juvenile court's characterization of the offenses as "serious" necessarily reflects that the juvenile court would declare them to be felonies upon remand. In *In re Dennis C.* (1980) 104 Cal.App.3d 16, 23, the court held that committing a juvenile to a felony-length period of physical confinement did not cure the failure to comply with section 702. A juvenile court's characterization of an offense as "serious" plainly provides less clarity about the court's intentions than if it had imposed a felony-length period of confinement. Moreover, the court here did not even impose a felony-length period of physical confinement, but instead committed appellant to juvenile hall for 150 days with 30 days stayed pending court review or successful completion of probation. Under the circumstances, we cannot say the juvenile court would necessarily declare the offenses to be felonies if directed to exercise its discretion under section 702 upon remand. Therefore, we agree with appellant that the matter must be remanded to the juvenile court for the declaration required by section 702.

3. The Record Incorrectly Reflects Appellant's Maximum Period of Confinement.

At the dispositional hearing held on January 23, 2006, the juvenile court agreed with appellant's trial counsel that the assault and battery counts were part of a single transaction warranting a stay of one of the two counts under Penal Code section 654. Because the two offenses were part of a single, indivisible transaction, appellant's trial counsel asked the court to set the maximum term of confinement at four years instead of the five-year maximum term stated in the probation report.[4] However, the minute order for the continued dispositional hearing held on January 30, 2006, erroneously states that the maximum term of confinement is five years. The People concede that the minute order must be corrected to reflect a four-year maximum term of confinement. While we agree

[4] The assault and battery counts each provide for an upper term of four years. (Pen. Code, §§ 243, subd. (d), 245, subd. (a)(1).) The probation officer apparently calculated the maximum confinement term by adding one-third of the three-year midterm of one of the counts to the four-year upper term of the other count. (See § 726, subd. (c) [when aggregating multiple counts, juvenile court must follow Pen. Code § 1170.1, subd. (a)].)

the minute order is incorrect, we conclude that the issue may be rendered moot depending upon how the court exercises its discretion under section 702 on remand.

Appellant's maximum term of confinement necessarily depends upon whether the juvenile court declares the offenses to be felonies or misdemeanors. If the court declares both offenses to be misdemeanors, then it will have to recalculate the maximum term of confinement accordingly, rendering moot the issue of whether appellant's maximum term of confinement is incorrectly reflected in a prior minute order. However, if upon remand the juvenile court declares one or both offenses to be felonies, then the record shall be corrected to reflect that appellant's maximum term of confinement is four years.

DISPOSITION

The matter is remanded to the juvenile court to exercise its discretion under section 702 to declare whether the assault and battery offenses were misdemeanors or felonies. If, upon remand, the court declares both offenses to be misdemeanors, then the court shall recalculate the maximum term of confinement under section 726, subdivision (c). Otherwise, if the court declares one or both offenses to be felonies, then the court shall correct the record to reflect that appellant's maximum term of confinement is four years. In all other respects, the jurisdictional and dispositional orders are affirmed.

_____
McGuiness, P.J.

We concur:

_____
Parrilli, J.

_____
Pollak, J.